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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

A. L. KORNMAN COMPANY, APPELLANT

VS.

D. W. MOULTON, *Commissioner of Highways of the State of Tennessee*, APPELLEE

On Appeal From The Supreme Court of Tennessee

STATEMENT AS TO JURISDICTION

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INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
QUESTION PRESENTED	3
STATEMENT	3
REASONS WHY THE FEDERAL QUESTION IS SUBSTANTIAL	7
CONCLUSION	12
APPENDIX	13

CITATIONS

CASES:

Armstrong v. United States, 364 U.S. 40	11
Atchison, T. & S. F. R. R. v. Public Utility Comm'n of California, 346 U.S. 346	2
Bellenfant v. American Nat'l Bank, 184 Tenn. 50, 195 S.W. 2d 30	8
Boxberger v. State Highway Dep't, 250 P. 2d 1007 (Colo.)	11
Brewer v. Norman, 190 Tenn. 117, 228 S.W. 2d 81	8
Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282	2, 9, 10
Hjorth Royalty Co. v. Trustees of Univ. of Wyoming, 30 Wyo. 309, 229 Pac. 9	11
Kansas City So. Ry. v. Road Improvement Dist., 266 U.S. 379	2
Kentucky State Park Commission v. Wilder, 256 Ky. 313, 76 S.W. 2d 4	10

Lathrop v. Donahue, 367 U.S. 820 2
Louisville & N. R. Co. v. Mottley, 219 U.S. 467 10
Lyon v. Idaho, 283 P. 2d 1105 (Idaho) 11
Malone v. Bowdoin, 369 U. S. 643 11
Montgomery v. Tapp, 204 Tenn. 372, 321 S.W. 2d 565 8
Myles Salt Co. v. Board of Commissioners, 239 U.S. 478 2
Nashville, C. & St. L. Ry. v. Wallace, 294 U.S. 405 9
Omnia Commercial Co. v. United States, 261 U.S. 502 10
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 10
Sanders v. Sexton, 182 N.Y. 277, 75 N.E. 529 10
State ex rel. State Park Board v. Tate, 365 Mo. 1213, 295 S.W. 2d 167 11
Wolfe v. North Carolina, 364 U.S. 177 10
Zucht v. King, 260 U.S. 174 9

CONSTITUTIONS AND STATUTES:

Constitution of Tennessee:
Article 1, Section 8 6
Article 1, Section 17 7
Constitution of the United States:
Fifth Amendment 11
Fourteenth Amendment 3, 6, 7, 9
Rules of the Supreme Court of the United States:
Rule 12(2) 2
Rule 13(1) 2
Tennessee Code Annotated:
Section 16-201 2
Section 16-603 2
Section 20-1702 ..... 2, 6, 7, 8, 9, 10
28 U.S.C. 1257(2) 2, 8, 12

IN THE
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A. L. KORNMAN COMPANY, APPELLANT

VS.

D. W. MOULTON, Commissioner of Highways of the State of Tennessee, APPELLEE

On Appeal from the Supreme Court of Tennessee

STATEMENT AS TO JURISDICTION.

A. L. Kornman Company, Appellant, respectfully prays that this Court note probable jurisdiction of its appeal seeking review of the judgment of the Supreme Court of Tennessee entered in this case on September 7, 1962.

OPINION BELOW.

The opinion in the Supreme Court of Tennessee is reported at 360 S. W. 2d 30, but is as yet unreported in the official reports of the Supreme Court of Tennessee. It is set forth in the Appendix, *infra*.

JURISDICTION.

This proceeding was originally initiated as a bill in equity in the Chancery Court for Davidson County, Tennessee, against the City of Nashville, Tennessee, to re-

move the cloud of an abandoned easement on appellant's title to certain real property (Tr. 20).[1] Subsequently, by an amendment to the Original Bill, D. W. Moulton, Commissioner of Highways of the State of Tennessee, was made a party defendant (Tr. 19). This proceeding was brought under the provisions of Tennessee Code Annotated, Sections 16-201 and 16-603, granting to the Chancery Courts of the State of Tennessee jurisdiction of traditionally equitable causes.

The judgment of the Supreme Court of Tennessee was entered on September 7, 1962. The Notice of Appeal to this Court (Tr. 1) was filed in the Supreme Court of Tennessee on November 1, 1962. On December 27, 1962, Associate Justice Weldon B. White of the Supreme Court of Tennessee, pursuant to Rule 13(1) of the Rules of this Court, enlarged the time in which this case may be docketed in this Court and the record filed with the Clerk from December 31, 1962, to January 30, 1963 (Tr. 59). The jurisdiction of this Court is invoked under 28 U. S. C. 1257(2). It is believed that the following cases, *inter alia*, sustain the jurisdiction of this Court: *Lathrop v. Donahue*, 367 U.S. 820; *Atchison, T. & S. F. R. R. v. Public Utility Comm'n of California*, 346 U.S. 346; *Kansas City So. Ry. v. Road Improvement Dist.*, 266 U.S. 379; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282; *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478.

STATUTE INVOLVED.

Tennessee Code Annotated, Section 20-1702 (Vol. 4, p. 483), provides as follows:

> No court in the state shall have any power, jurisdiction or authority to entertain any suit against the

[1] "Tr." refers to the transcript of the record prepared by the Clerk of the Supreme Court of Tennessee for forwarding to this Court pursuant to Rule 12(2) of the Rules of this Court.

state, or against any officer of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state.

QUESTION PRESENTED.

When a landowner's sole remedy to remove a cloud on the title to his property, consisting of a quitclaim deed to the state by a third party of an abandoned easement, is by suit against the state, and the suit is dismissed on the ground that it violates a statute prohibiting unconsented suits against the state, is the state's sovereign immunity statute, thus applied, violative of the Fourteenth Amendment to the Constitution of the United States as a deprivation of property without due process of law?

STATEMENT.

In its present posture this is a suit against the Commissioner of Highways of the State of Tennessee seeking the removal of the cloud on appellant A. L. Kornman Company's title to certain real property located in Davidson County, Tennessee, the cloud consisting of a quitclaim deed from the City of Nashville to the State of Tennessee of an abandoned easement affecting the appellant's property. The suit has never advanced beyond the pleading stage, the original bill having been met first by a plea in abatement, and, as amended, by a motion to dismiss, as will hereinafter appear.

This suit originated as a bill in equity filed August 28, 1959, in the Chancery Court of Davidson County, Tennessee, on behalf of the A. L. Kornman Company, appellant herein, against the City of Nashville, Tennessee (Tr. 2C).

The original bill alleged that the City of Nashville had acquired by a decree of condemnation an easement for street purposes in a described tract of property adjacent to the Public Square within the corporate limits of the City of Nashville, Davidson County, Tennessee (Tr. 2C-4). It was further averred that the acquisition of the easement had necessitated the demolition of a large, multiple story building occupying the land burdened by the easement (Tr. 3). Subsequent to the obtaining of the easement across appellant's property, the city, in conjunction with the State of Tennessee and the United States, constructed over a portion of the property burdened by the easement approaches to the Victory Memorial Bridge across the Cumberland River (Tr. 3).

The original bill exhibited a photograph showing the bridge, a portion of the unused property bounded by a concrete fence (which was not in issue), and an area or grassy plot between the concrete fence and an adjoining building (Tr. 6). It was alleged that the City of Nashville had abandoned its easement in the last described, unused tract or plot of land and that the property was owned by appellant free of the easement (Tr. 4). The bill prayed for a judicial declaration that the easement in the described tract had been abandoned and that any claim of the City of Nashville to the property be removed as a cloud on the appellant's title (Tr. 5).

On March 4, 1960, the City of Nashville filed a plea in abatement, alleging that in acquiring the easement it had merely acted as an acquisition agent for the State of Tennessee, that on July 10, 1958, it had conveyed to the state by an exhibited quitclaim deed any interest it had in the subject property (Tr. 7, 9, 17). The city's prayer that it be dismissed as a party defendant was subsequently granted by a decree of the Chancellor dated January 12, 1962 (Tr. 31).

Subsequent to the filing of the plea in abatement by the City of Nashville, but prior to the ruling of the Chancellor thereon, the appellant A. L. Kornman Company amended its original bill to allege that the street improvement plans and specifications approved by the federal government, the State of Tennessee through its Highway Department, and the City of Nashville, which marked the exact and permanent boundaries for the property to be used for street purposes, excluded the area as to which the original bill had alleged the easement to have been abandoned (Tr. 19). Additionally, the amendment to the original bill reiterated the allegations of the original bill that the boundaries of the area occupied for street purposes had been finally and permanently established, and that consequently, since the abandonment of the easement had occurred prior to the quitclaim deed to the State of Tennessee, the City of Nashville had no interest whatever to convey to the state (Tr. 20). Since D. W. Moulton, appellee herein, the Commissioner of Highways of the State of Tennessee, was the state officer vested with authority over property of the state owned or possessed for street or highway purposes, the amendment to the original bill alleged that appellee Moulton did not acquire possession of or control over the property under any lawful authority, and further that the quitclaim deed by the City of Nashville to the State of Tennessee was a naked cloud on appellant's title to its property (Tr. 21). The original bill as amended joined appellee Moulton as a party defendant and prayed that the court enter an order removing any claim of appellee Moulton to the property claimed by appellant as a cloud upon its title (Tr. 21, 22).

On February 15, 1961, the Attorney General of Tennessee filed a motion on behalf of appellee D. W. Moulton to dismiss the bill as to him on the ground that the suit was unconsented to by the State of Tennessee, and that as

such it was prohibited by Tennessee Code Annotated, Section 20-1702 (Tr. 23).

When met by the state's plea of sovereign immunity, the appellant A. L. Kornman Company on October 26, 1961, filed an amendment to the original bill as amended, alleging that D. W. Moulton, Commissioner, as agent and representative of the State of Tennessee, was a necessary and proper defendant to the suit by reason of the recorded quitclaim deed to the abandoned easement (Tr. 24). The amendment further averred that the cause was not a suit to reach the state, its treasury, funds or property, but rather a suit to remove a cloud upon complainant's title held by the state (Tr. 25). In that pleading the appellant also charged that if Tennessee Code Annotated Section 20-1702, the statute prohibiting unconsented suits against the state:

> Does by its terms prohibit the complainant from maintaining this suit against the State of Tennessee for the relief sought, said statute violates Article 1, Section 8, of the Constitution of Tennessee and the 14th Amendment to the Constitution of the United States in that complainant is being deprived of its right to a determination of its property rights asserted herein without a hearing and without an opportunity to be heard against a necessary and proper defendant, the State of Tennessee (Tr. 25).

Without assigning reasons therefor, appellee Moulton's motion to dismiss was overruled by a decree of the Chancellor dated January 29, 1962 (Tr. 33). On February 2, 1962, the Chancellor by decree treated the motion to dismiss of the appellee Moulton as a demurrer and granted a discretionary appeal to the Supreme Court of Tennessee (Tr. 34).

In an opinion dated September 7, 1962, the Supreme Court of Tennessee reversed the decree of the Chancellor

in overruling appellee Moulton's motion to dismiss, and ordered the bill dismissed at the cost of appellant herein, A. L. Kornman Company (App., *infra*, p. 13). It was there held that this action against the Commissioner of Highways was a "suit against the state" (App., *infra*, p. 16). As such, it was the opinion of the Supreme Court of Tennessee that the suit was prohibited by Tennessee Code Annotated, Section 20-1702, and Article 1, Section 17, of the Constitution of Tennessee forbidding suits against the state (App., *infra*, pp. 21-23). The court rejected the argument of appellant herein that the application of Tennessee Code Annotated, Section 20-1702, to forbid the suit at bar deprived appellant of its only remedy whereby it could remove the cloud of the quitclaim deed to the abandoned easement and obtain the full enjoyment of its valuable property rights and that such application of the statute resulted in the appellant being deprived of valuable property rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States (App., *infra*, pp. 21-23). The basis for the court's opinion was that it would be against public policy to force the state to defend the suit, and that furthermore, assuming the state were maintaining a cloud on the appellant's title, the Court would take judicial notice that the state would relinquish its claim in due course (App., *infra*, p. 23).

REASONS WHY THE FEDERAL QUESTION IS SUBSTANTIAL.

A. In this case the Supreme Court of Tennessee has, in the face of seasonably raised federal constitutional objections, applied the Tennessee statute forbidding unconsented suits against the state, Tennessee Code Annotated, Section 20-1702, *supra*, so as to effectually destroy the appellant's property rights in a valuable piece of realty. Both the Chancellor and the Supreme Court of Tennessee

properly treated the motion of appellee Moulton to dismiss as a demurrer, which under Tennessee practice admits all facts well pleaded in appellant's original bill as variously amended, including reasonable inferences to be drawn therefrom. See, *e.g.*, *Montgomery v. Tapp*, 204 *Tenn.* 372, 321 S.W. 2d 565; *Brewer v. Norman*, 190 *Tenn.* 117, 228 S.W. 2d 81; *Bellenfant v. American Nat'l. Bank*, 184 Tenn. 50, 195 S.W. 2d 30. These facts are: the easement for street purposes acquired in appellant's property by the City of Nashville as acquisition agent for the State of Tennessee was abandoned as to the tract involved in this litigation subsequent to the construction of the Victory Memorial Bridge; at the time the City of Nashville quitclaimed the easement to the state, neither the city nor the state had any right, title, or interest in appellant's property, the original easement taken having been abandoned and the unused portion of the property having reverted to appellant free of the burden of the easement.

Even prior to the instant litigation appellant's property rights in the realty here involved were all but destroyed, because in view of the recorded quitclaim deed, no title company would issue a policy of title insurance, no purchaser would buy the property, no lender would advance money for construction on the property, despite the fact that the state has no easement or any other interest in the property. *A fortiori*, these things are true subsequent to the holding of the Supreme Court of Tennessee that the sovereign immunity statute, T.C.A., Section 20-1702, forbids this suit to remove the cloud on the title to appellant's property.

This case is clearly within the jurisdictional requirements of 28 U.S.C. 1257(2), and an appeal is the method by which the question may properly be brought before this Court. "In the [Tennessee Supreme] court the [appellant] did not simply claim a right or immunity under the

Constitution of the United States, but distinctly insisted that as to the transaction in question the [Tennessee] statute was void, and therefore unenforceable, because in conflict with the [Due Process Clause of the Fourteenth Amendment to] the Constitution" (Tr. 25). *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 288-89. The Court nevertheless applied and enforced the statute, which "of course . . . was an affirmation of its validity when so applied." *Dahnke-Walker Milling Co., supra*, 257 U.S. at 289. As this Court pointed out in the *Dahnke-Walker Milling Co.* case, *supra*, "a statute may be invalid as applied to one state of facts and yet valid as applied to another." 257 U.S. at 289. Here the appellant's attack on T.C.A., Section 20-1702, went directly to its validity as applied to the special state of facts presented, and without doubt presents a substantial federal question. *Zucht v. King*, 260 U.S. 174; *Nashville, C. & St. L. Ry. v. Wallace*, 294 U.S. 405.

Manifestly the basis for the court's decision was the validity of T.C.A., Section 20-1702, and of course it does not "matter on what ground the court upheld and enforced the statute." *Dahnke-Walker Milling Co., supra*, 257 U.S. at 289. Nor can it be reasonably argued that the court's decision rested on an alternative non-federal ground. The holding that the appellant was paid full fee simple value for the property upon the original condemnation and that there had been no "taking without just compensation" not only begs the question, as the court itself admits (App., *infra*, p. 22) since only an easement was taken, and the easement abandoned, but it confuses the original, admittedly proper taking with the unlawful recording of the quitclaim deed subsequent to the abandonment. Additionally, it ignores the fact that whatever the court takes "judicial notice" the state paid originally, it only obtained an easement.

Whether or not the recording of the quitclaim deed by the state amounted to a "taking without just compensation" within the meaning of the United States Constitution,[2] it has destroyed the appellant's property rights.[3] Under the holding of the Tennessee Supreme Court, by virtue of T.C.A., Section 20-1702, the appellant is remediless to remove this destructive cloud on its title, the Constitution of the United States to the contrary notwithstanding.

B. This is a case where "the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void," but it is indeed much more than that. *Dahnke-Walker Milling Co., supra,* 257 U.S. at 290. This appeal raises constitutional questions of far-reaching importance in view of the number and scope of state immunity from suit statutes in this country. To our knowledge this Court has never reviewed these questions with respect to the extent that state sovereign immunity statutes may constitutionally wipe out the only judicial remedy which a citizen has to obtain full enjoyment of his property.

State courts in this country are holding that a citizen may not bring a suit against the state to obtain partition where he and the state own undivided interests in property (*Kentucky State Park Commission v. Wilder,* 256 Ky. 313, 76 S.W. 2d 4); that a citizen may not sue the state to cancel a void tax deed (*Sanders v. Sexton,* 183

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[2] It was certainly not an inconsequential effect of the legitimate exercise of governmental emergency or police powers. *Cf. Omnia Commercial Co. v. United States,* 261 U.S. 502; *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393; *Louisville & N. R. Co. v. Mottley,* 219 U.S. 467.

[3] "It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward non-federal grounds of decision which are without any fair or substantial support. *N.A.A.C.P. v. Alabama,* 357 U.S. 449; *Staub v. Baxley,* 355 U.S. 313; *Ward v. Love County,* 253 U.S. 17." *Wolfe v. North Carolina,* 364 U.S. 177, 185-186.

N.Y. 277, 75 N.E. 529); and that a citizen may not sue the state to remove a cloud on the title to his property, regardless of how unconscionable the state's conduct may have been (*Hjorth Royalty Co. v. Trustees of Univ. of Wyoming*, 30 Wyo. 309, 229 Pac. 9; instant case).

On the other hand some state courts are holding that a cotenant may maintain a partition against the state (*State ex rel. State Park Board v. Tate*, 365 Mo. 1213, 295 S. W. 2d 167). Similarly some state courts have held that state sovereign immunity statutes may not constitutionally preclude a suit to remove a cloud on title to real property, where that is the only judicial remedy available to the landowner (*Lyon v. Idaho*, 283 P. 2d 1105 (Idaho); *Boxberger v. State Highway Dep't*, 250 P. 2d 1007 (Colo.)).

In our view, it is imperative that this Court consider fully the effect and policy of such statutes vis-a-vis due process mandates of the Fourteenth Amendment, where their effect as applied is to destroy property rights and the sole judicial remedy at one and the same time. The effect of such recent decisions of this Court as *Armstrong v. United States* 364 U.S. 40, and *Malone v. Bowdoin*, 369 U.S. 643, on the judicial construction of state sovereign immunity statutes, such as occurred here, needs to be explored in detail. *Armstrong* and *Malone, supra*, stand for the apparent proposition that the sovereign immunity of the United States may not, consistent with the Fifth Amendment, be interposed to destroy a citizen's sole judicial remedy by which valuable property rights may be protected from the depredations of an overzealous federal government. We respectfully suggest that it is now appropriate that this Court consider whether the Fourteenth Amendment lends similar protection to a citizen with respect to state government.

Such consideration will require extensive briefing on the merits and oral argument.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court has jurisdiction of this appeal under 28 U.S.C. 1257(2), that the federal question submitted is substantial, and that this appeal is worthy of plenary consideration by the Court, including briefs on the merits and oral argument.

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JANUARY, 1963.

APPENDIX.

IN THE
SUPREME COURT OF TENNESSEE.

A. L. KORNMAN COMPANY, V. D. W. MOULTON, COMMISSIONER.	DAVIDSON EQUITY. Hon. Alfred T. Adams, Chancellor.

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For Appellee:

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Opinion.

The bill, as variously amended, sought to quiet title to a portion of certain lands which had previously been acquired under eminent domain proceedings by the City of Nashville acting as an acquisition agent on behalf of the State of Tennessee. Apparently the condemnation in the first instance was pursuant to Chapter 73 of the Public Acts of 1949 wherein authority was given to condemn land for the purpose of constructing the "Victory Memorial Bridge". This bridge was constructed and at the end of the bridge, where the land is now sought, a large building was taken down and demolished, and the bridge duly constructed with various and sundry grass plots around the edge, etc. By the present bill it is alleged that a small portion of this land, which was taken under the condemnation proceeding, has been abandoned and that only an

easement was condemned in the first instance and since the land has been abandoned it reverts to the appellees, who are successors in title to the owners of the property at the time the condemnation suit was had.

The suit was originally instituted against the City of Nashville, but it was discovered that the City had conveyed any interest that it had in it to the State by a quit-claim deed, and there seems to be no argument or discussion of the fact that the City in acquiring the land in the first instance was merely the acquisition agent on behalf of the State. The City on a proper plea is out of the law-suit, and the present appellant, Commissioner of Highways, was properly made a defendant to the suit.

The Commissioner filed his motion to dismiss, alleging that this was in effect a suit against the State and was filed against him in an effort to reach property belonging to the State, and that such suit, being one against the State, may not be maintained because of inhibitions found in the State Constitution, Article 1, § 17, providing that: "Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct", and in T.C.A., § 20-1702 (which originated with the Act of 1873), providing as follows:

> "No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with the view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state."

When this motion of the Commissioner came on to be heard it was overruled by the Chancellor. To his action in overruling the motion the Commissioner excepted and

prayed a discretionary appeal. This appeal was granted by the Chancellor, the Chancellor treating the motion as a demurrer under the provisions of § 20-1702, T.C.A.

We now are met with a motion on behalf of the appellee to dismiss this appeal because it is premature and does not settle any rights of the parties; that this being true the Chancellor had no discretion or authority to grant the appeal from his ruling disallowing this motion.

Insofar as here applicable the statute, § 27-305, T.C.A., allowing discretionary appeals provides, as follows:

> "The Chancellor * * * may, in his discretion, allow an appeal from his decree in equity causes determining the principles involved * * *; or he may allow such appeal on overruling a demurrer; * * *."

This statute has been before this Court and the Court of Appeals numerous times as will be noted by various decisions cited following this Code Section. Suffice it to say, these decisions clearly support the proposition that the Chancellor may upon sustaining or overruling a demurrer, which determines certain rights of the parties involved in the litigation, grant a discretionary appeal. It is obvious to us that when the Chancellor considered this motion as a demurrer (he had this right, Morgan v. Layne, 165 Tenn. 513, 518, 56 S.W.2d 161, 162). This motion, or demurrer as it was treated, raises the direct question of whether or not it is necessary for the State to defend an action of the kind here (an action to quiet title or to remove a cloud from the title), and if the State does not have to defend the demurrer settles the question entirely; while if it does have to defend this right of the State, it will be settled by the action on this demurrer. Consequently, we think that the Chancellor was well within his rights and that he exercised his discretion in allowing this appeal fairly and on reason and not as an arbitrary or

capricious act. Having thus acted, as we see it under this record, the motion to dismiss because the discretionary appeal was improvidently granted will be overruled.

We now come to the merits of the controversy as set forth hereinbefore when we stated the question the demurrer raises, that is, whether or not the State may be sued in an action to quiet title or to remove a cloud from a title claimed by the original complainant, now appellee.

In Brooksbank v. Leech, 206 Tenn. 176, 332 S.W.2d 210, we said that a suit against a Commissioner of Highways is a "suit against the State." We cited authority there for that proposition. So we begin a discussion of the question here with that premise settled, that is, that the present suit against the Commissioner of Highways is a suit against the State. This being true, should the plea of sovereign immunity of the State be upheld by this Court under the allegations of the bills herein? This Court in Fritts v. Leech, 201 Tenn. 18, 296 S.W.2d 834, had the question before it of § 20-1702, T.C.A., and there made the comment that "Therefore, it is evident that this suit in the aspect of an ejectment suit is one with a view to reach the property of the State, in violation of said above Code section." The argument, of course, is that a suit to quiet title or remove a cloud from title would in every respect be as much a suit against the State as would an ejectment suit. Some authorities from other jurisdictions that we have run into hold to this effect.

Chumbley v. State, 183 Tenn. 467, 192 S.W.2d 1007, was a suit in which Chumbley sought possession of a tract of land which was at the time of the institution of the suit in possession of the State, and in which he asserted a superior title. This Court held that such an action "being a suit against the State of Tennessee, it is barred by Article I, section 17 of the Constitution, since it is not brought in such manner as the Legislature has directed."

There is no claim in the present suit that there has been any legislative enactment which would permit the State to be sued in an action of the kind now before us.

In addition to reading the excellent briefs and the authorities cited therein by both sides we, to satisfy our own mind about the matter, made a rather extensive investigation. In the course of this investigation we investigated the quieting of title as is reported in 44 Am. Jur., § 77, under that title, at page 62, and we found that the author of that work says this:

> "When land sold for nonpayment of taxes has been bought in by the state, the owner cannot bring a bill to remove the cloud upon his title against the comptroller of the state, because such a proceeding is in effect a suit against the state itself."

As authority for that statement the author cites Sanders v. Saxton, 182 N.Y. 477, 75 N.E. 529, 1 L.R.A.,N.S., 727, 108 Am.St.Rep. 826. This same case is cited in appellant's brief. We have read the case twice, and think to all intents and purposes it supports the proposition of the Commissioner here.

In this Sanders case the lower courts decided to the contrary but when it was taken to the court of last resort of New York that court unanimously held that it was a suit against the State and could not be maintained. It was said in the Sanders case that the "only object and purpose of a suit in equity to remove a cloud on the title to property is to have any adverse title that may be asserted under such cloud passed on and adjudged void, so that the plaintiff in possession may be forever afterwards free from any danger of the hostile claim, it would seem plain that, where the judgment in an action cannot conclude or bind a party claiming under the adverse title, the action must fail." In other words it was necessary to have the

State a party where it had title to the property. The court in this Sanders case said further; "The same principle governs the case now before us. The title now sought to be adjudged void is the title of the people of the state, the defense of which has not been committed to any officer by whose appearance the state could be concluded." Further, "As we have not been referred to any statute authorizing a suit against the state for the matter set forth in the complaint, we are of opinion that the action cannot be maintained."

The State likewise in support of their proposition that the suit cannot be maintained cites American Trust & Savings Bank of Albuquerque v. Scobee, 29 N.M. 436, 224 P. 788, which was a suit to quiet title and remove a cloud, wherein the State had reserved certain mineral rights. The court held such an action could not be prosecuted against the State.

Likewise the State cites Hjorth Royalty Co. v. Trustees of University of Wyoming, 30 Wyo. 309, 222 P. 9. This was a suit against the University to quiet title, and in reading the opinion we find that the court premised its opinion on the fact that this was a suit against the State, and as such could not be maintained and devoted the majority of the opinion to the finding of whether or not the Trustees of the University were in effect standing in the shoes of the State, so to speak, and, if so, it was the same as suing the State. The court so concluded and held that the suit was not maintainable without the consent of the State. The opinion quotes the language of Article I, § 8, of the Constitution of Wyoming, which is identical with Article I, § 17, of the Constitution of Tennessee herein before quoted.

We have read the other cases cited in the briefs and in our investigation find also that the question of a suit

against the State is annotated at length in 44 L.R.A.,N.S., 189, 42 A.L.R. 1464, and 50 A.L.R. 1408. In these various annotations there are cases from practically every State of the Union cited, including many from Tennessee, wherein the plea, as here entered on behalf of the State, was sustained. In other words, the courts unanimously uphold the plea of immunity of the State to be sued in the absence of its consent. This doctrine was probably first recognized by the Supreme Court of the United States in Cohens v. Virginia, 6 Wheat. 264, 380, 5 L.Ed. 257, wherein Chief Justice Marshall, speaking for the Court, gives assent to the principle and says this: "The counsel for the defendant in error * * * have laid down the general proposition, that a sovereign independent state is not suable except by its own consent." This general proposition, he adds, will not be controverted.

Counsel for the appellee cites in support of the proposition that such a suit is maintainable, Lyon, etc. v. State of Idaho, 76 Idaho 374, 283 P.2d 1105. Reading certain statements in that case it would seem that the case supports their position. A careful reading of the case though will show, in the second paragraph thereof, this: "Appellants in their brief have evidently abandoned the claimed right to maintain the action against the State of Idaho. We quote from their brief as follows: 'It is conceded here that the State of Idaho cannot be sued and was so conceded at the time of argument. * * *' Hence we shall not discuss or decide whether the respondent State of Idaho is immune because of sovereignty from a suit of this nature, but shall limit the decision to the claimed right to maintain the action against the Board of Education of the State of Idaho." Thus, as we see it, this case is in effect not authority for the proposition advanced.

Appellee likewise cites Boxberger v. State Highway Department, 126 Colo. 438, 250 P.2d 1007, from the Supreme

Court of Colorado, and quotes at length therefrom. This quotation and what this opinion held was nothing more than that you couldn't take private property from a person without giving them just compensation. In other words in this case the State Highway Department of Colorado had taken the property of Boxberger and didn't want to compensate him for it, thus the court held that this was a violation of § 15 of Article II, of the Constitution of Colorado, which provided, "Private property shall not be taken or damaged, for public or private use, without just compensation." Thus it was that this case is based on the provision of the Constitution of Colorado which is almost identical with the Fifth Amendment to the Constitution of the United States which provides, "* * * nor shall private property be taken for public use, without just compensation." The same meaning is gotten from Article I, § 8, of the Constitution of Tennessee. Thus it is that these authorities are not authority for the proposition that the plea of immunity on behalf of the State is not good. The fact of the business is, we think, under all authorities that we can find, especially including those of Tennessee, that such a plea must be sustained if the factual provision brings it within the inhibitions of the Constitution, Article I, § 17, and Code Section 20-1702, heretofore cited. Exceptions, of course, have been made as were made in Stockton v. Morris & Pierce, 172 Tenn. 197, 110 S.W.2d 480, wherein the Court cited and quoted from an earlier case of the Insurance Commissioner wherein an exception was likewise made, and it was shown that those things were not a suit against the State in the sense that they were trying to acquire property of the State. Those suits though are not germane here.

The appellee likewise relies on United States v. Lee, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171. In this case, the Lee case, it was held that, while the United States could

not be sued without its consent, still an action might be brought in ejectment to recover lands in the possession of the officers and agents of the United States. This case and others support the doctrine that officers and agents of the United States and of the States may be sued for their illegal acts or to recover property illegally possessed by them despite the immunity of their principal. That doctrine does not cover the case before us.

Counsel for the appellee apparently recognized what has been said above and they state that if this plea is right they are not remediless because the refusal to allow them to set up their claim to the abandonment of this property (of course, the burden is on the one who claims abandonment to show the abandonment) is violative of the due process provisions of Article I § 8, of the Tennessee Constitution, above referred to, and the relevant portion of the Fifth Amendment to the United States Constitution, above referred to. In making this argument they refer to statements we made in the Brooksbank case, and also they quote from the Boxberger case, supra, as well as the holding of the Supreme Court of the United States in United States v. Lee, supra, and particularly the case of Armstrong v. United States, 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554. This is a very interesting case (the Armstrong case). In this case certain claimants had done work on ship hulls which were under contract to be built for the United States. Apparently the builder failed and liens were attempted to be perfected by lien holders. In the meantime the United States had taken over these ships and the question then arose as to whether or not they could get their money on these liens. The lower courts held they could not for reasons not necessary here to repeat, while the Supreme Court of the United States reversed the holding in this case based on the fact that when the government took over this property it constituted a taking

within the relevant portion of the Fifth Amendment, above quoted. It is said that we should invoke this same procedure here and hold that the appellee has a right to set up his claim that there had been an abandonment by the State of this property and assert it. The State takes the position that one constitutional provision should not be thrown up against another. We don't think it is necessary to do that, as the two can be read together. If it is found that the State is taking a person's property without just compensation, then this provision of the Constitution can be and should be enforced because clearly it was never the intention of the framers of our Constitution and the enactors of the statute providing immunity for the State that the State could take the property of its citizens and not compensate them for it.

We think though that here under the particular facts of this case another question arises which isn't discussed in any of the briefs and probably of greater importance in view of the constitutional provisions referred to and the legislative history of the immunity of the State, and that is that it would be against the public policy to force the State to defend after it has through lawful means condemned and paid the full value of the property condemned. Of course, it could be argued that this may be begging the question, or whatnot, because it is said as it stands there is the allegation that the State has abandoned this and thus having abandoned it the title reverts to the appellee. This, of course, would be true assuming there is an abandonment and things of that kind, but looking at it from a practical standpoint we know that even though the State merely condemned in the first instance an easement, that in a condemnation proceeding the damages are fixed by a jury at an amount equal to the value of the fee. We can almost take judicial knowledge of this fact, and in a condemnation by the State to take the property of a private

individual, and in this case a large building was wrecked by the State as if the whole thing would be used, we cannot put our stamp of approval on allowing the State officers to be sued after the State had acquired the property by a legitimate condemnation suit and paid the damages. To allow the State officers to then be sued for any little strips here and there along the highways in building the various bridges and highways, would take extra courts and the number of people who would be required to look after and do these things would be prohibitive. Then, too, we know as a practical proposition that if properties have been abandoned by the State after they have been taken by legitimate condemnation that sooner or later, the State by proper legislation will consent to the proper owners through proper proceedings having their property back. In other words, what we are trying to say is that after there has been a legitimate fair compensation paid for the property even though taken for an easement when there is an alleged abandonment of that easement afterwards the State should not have to defend that suit without its consent to it. The compensation for this easement taken was for the value of the land as if the fee had been taken. Kentucky-Tennessee Light & Power Co. v. Beard, 152 Tenn. 348, 277 S.W. 889.

For reasons herein stated the motion, which is considered as a demurrer, will be sustained and the cause dismissed as to the Commissioner.

Mr. Justice Felts, Hamilton S. Burnett, Justice, and Mr. Justice Dyer, concur.

Mr. Justice White and Mr. Justice Tomlinson (Ret.) did not participate herein.

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No. 775

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

A. L. KORNMAN COMPANY,
Appellant,

vs.

DAVID M. PACK, Commissioner of Highways
of the State of Tennessee,
Appellee.

On Appeal from the Supreme Court of Tennessee.

MOTION TO DISMISS.

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INDEX.

	Page
Motion to Dismiss	1
Opinion Below	1
Statute Involved	2
Question Presented	2
Statement	2
Conclusion	9

CITATIONS.

Cases:

Adirondack Railway Co. v. New York, 176 U. S. 335	5
Boyd v. Hunt, 102 Tenn. 495	6
Cohens v. Virginia, 6 Wheat. 264, 380, 5 L. Ed. 257	3
Cottrell v. Daniel et al., 30 Tenn. App. 339	6
Decatur v. Paulding, 14 Pet. 497	4
Eldridge v. Trezevant, 160 U. S. 452, 40 L. Ed. 490	5
Larson v. Domestic and Foreign Commerce Corp., 337 U. S. 682	4
Malone v. Bowdoin, 369 U. S. 643	8
Petty v. Tennessee-Missouri Bridge Commission, 359 U. S. 275	8
Phy v. Hatfield, 102 Tenn. 694	6
Reelfoot Lake Case, 127 Tenn. 575	6
Russell v. American Association, 139 Tenn. 124	6
Sauer v. New York, 206 U. S. 548	4
So. Coal & Iron Co. v. Schwoon, 45 Tenn. 191	7
State ex rel. Phillips v. Smith, 34 Tenn. App. 608	6
Tennessee Oil Co. v. Brown, 131 Fed. 696, 65 CCA 524	7
United States v. Lee, 106 U. S. 196, 27 L. Ed. 171	8
United States v. The Montello, 87 U. S. 443 (20 Wall.)	7

Constitution and Statutes:

Constitution of Tennessee:
Article I, Section 17 2
Constitution of the United States:
Fourteenth Amendment 2, 5
Tennessee Code Annotated:
Section 20-1702 2
Chapter 73, Public Acts, 1949 3
72 Stat. 904, 23 U. S. C. A. 131 7
72 Stat. 916, 23 U. S. C. A. 319 7
72 Stat. 888, 23 U. S. C. A., Sec. 103 (d) 7

Text:

49 Am. Jur. 301-2 8

IN THE

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A. L. KORNMAN COMPANY,
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vs.

DAVID M. PACK, Commissioner of Highways
of the State of Tennessee,
Appellee.

On Appeal from the Supreme Court of Tennessee.

MOTION TO DISMISS.

David M. Pack, Commissioner of Highways, State of Tennessee, substituted as Appellee, vice D. W. Moulton, his predecessor in office, respectfully moves the Court to dismiss the appeal on the ground that it does not present a substantial Federal Question.

OPINION BELOW.

The opinion of the Supreme Court of Tennessee reported at 360 S. W. 2d 30, but is as yet unreported in the official reports of the Supreme Court of Tennessee, is set forth in the Appendix to Appellant's Brief (pp. 13-23).

STATUTE INVOLVED.

Tennessee Code Annotated, Section 20-1702 (Vol. 4, p. 483), provides as follows:

> "No court in the state shall have any power, jurisdiction or authority to entertain any suit against the state, or against any officer of the State, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state."

This Statute was enacted pursuant to Article I, Section 17 of the Constitution of Tennessee which provides in pertinent part:

> "Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct."

QUESTION PRESENTED.

The real question presented is whether the Fourteenth Amendment of the Constitution of the United States should be so construed as to permit a former landowner to maintain a suit against the State to recover a part of its land which has been condemned for highway purposes, notwithstanding the foregoing constitutional and statutory provisions.

STATEMENT.

The Appellant admits that an easement for street purposes in the property here in question was acquired by a decree of condemnation; that the acquisition of the easement had necessitated the demolition of a large, multiple story building occupying the land and that the State of

Tennessee in conjunction with the United States and the City of Nashville constructed approaches to the Victory Memorial Bridge across Cumberland River over a portion of the property burdened by the easement (Appellant's Brief, p. 4).

The Appellant does not assert that the State did not pay adequate damages for the taking of its property.

Appellant does not question the correctness of the holding of the Supreme Court of Tennessee, "that the City (of Nashville) in acquiring the land in the first instance was merely the acquisition agent of the State" (Appellant's Brief, p. 14). The statute under which the property was condemned provides that the title acquired shall be in the State (Section 2, Chapter 73, Public Acts, 1949).

The Supreme Court of Tennessee in sustaining the plea of sovereign immunity in this case said, in part:

> "This doctrine was probably first recognized by the U. S. Supreme Court in **Cohens v. Virginia**, 6 Wheat. 264, 380; 5 L. Ed. 257, wherein Chief Justice Marshall, speaking for the Court, gives assent to the principle and says this: 'The counsel for the defendant-in-error . . . have laid down the general proposition, that a sovereign independent State is not suable except by its own consent.' This proposition, he adds, will not be controverted" (Appellant's Brief, p. 19).

The Tennessee Court further said:

> "It would be against public policy to force the State to defend after it has through lawful means condemned and paid the full value of the property . . . looking at it from a practical standpoint we know that even though the State merely condemned in the first instance an easement, that in the condemnation proceedings the damages are fixed by the jury at

an amount equal to the value of the fee . . . in a condemnation by the State to take the private property of a private individual, and in this case a large building was wrecked by the State as if the whole thing would be used, we cannot put our stamp of approval on allowing the State officials to be sued after the State had acquired the property by a legitimate condemnation suit and paid the damages. To a. w the State officials to then be sued for any little strips here and there along the highways . . . would take extra courts and the number of people . . . required to looks after . . . these things would be prohibitive. . . . The compensation for this easement taken was for the value of the land as if the fee had been taken". (Appellant's Brief, pages 22-3).

In the case of **Larson v. Domestic and Foreign Commerce Corporation**, 337 U. S. 682, 704, the Court recognized the practical problem in saying:

> "The Government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As early recognized the 'interference of the Courts with the performance of the ordinary duties of the Executive Department of the Government, would be productive of nothing but mischief'" (Quoting from **Decatur v. Paulding**, 14 Pet. 497, 516).

necessity for taking an easement in Appellant's pr the amount of property rights required for the admittedly public purpose and whether there has been an abandonment of any part thereof are for "the final determination of the State Court". **Sauer v. New York**, 206 U. S. 548.

The general rule is that the necessity or expediency of appropriating particular property for public use is not a

matter of judicial cognizance, but one for the determination of the legislative branch of the government, and this must obviously be so where the state takes for its own purposes. The state possesses the power as a sovereign, and as a sovereign exerts it. Its citizens cannot call on the Courts to review the grounds on which the State has acted in the absence of legislation permitting that to be done. **Adirondack Railway Co. v. New York**, 176 U. S. 335, 349.

The provisions of the 14th Amendment to the Constitution of the United States do not override public rights existing in the form of servitudes or easements which are held by the Courts of the State to be valid under the Constitution and laws of the State. **Eldridge v. Trezevant** (1896), 160 U. S. 452, 40 L. Ed. 490.

The necessity for the right-of-way of the size taken was settled in the condemnation proceeding and it cannot be relitigated in this one.

"In the present case it cannot be contended successfully that the act of Wismer in filling up the ditch or depression on the right-of-way was an interference with the rights of the public. Upon the contrary, the effect, if anything, was to promote safety of travel along the paved portion of the road. Nor was his beautification of the area and the construction of the circular driveway giving an additional means of ingress and egress adverse to the rights of the public. It may be that in years to come the state will require an additional portion of the right-of-way in order to widen the pavement. If so, the area will be available. In the meantime, under its general power to control its highways, the State has authority to authorize any use of the right-of-way consistent with the purpose of the highway and not in derogation of the rights of the public or those of the abutting landowners.

"We hold, (1) that the necessity of a right-of-way of the size acquired in the condemnation proceeding was conclusively settled by the consent decree in that case and is not open for consideration in the present one; and (2) that there is no evidence indicating a purpose to abandon the right-of-way so acquired or any part of it." **State ex rel. Phillips v. Smith,** 34 Tenn. App. 608, 614, 616. Certiorari denied by Supreme Court of Tennessee, December 9, 1950.

To justify the conclusion that there has been an abandonment, there must be some clear and unmistakable affirmative act indicating a purpose to repudiate the ownership. **Phy v. Hatfield,** 122 Tenn. 694, 696.

Mere nonuser will not amount to an abandonment which will impair or defeat an easement. The failure to use must be accompanied by some act of the owner of the dominant estate, clearly indicating his purpose to set up no further claim in order to work abandonment. **Boyd v. Hunt,** 102 Tenn. 495, 499. Appellant avers that the strip of land here in question has been landscaped by the State. It is, therefore, being used.

It would be desirable from the Appellant's viewpoint to have this easement done away with, but we are dealing with fixed and settled property rights. **Cottrell v. Daniel et al.,** 30 Tenn. App. 339, 346. Certiorari denied by Supreme Court of Tennessee, October 18, 1947.

A grantee cannot abandon rights by mere implication, or by any conduct short of some clear and unmistakable affirmative act indicating a purpose to repudiate ownership. **Russell v. American Association,** 139 Tenn. 124, 133.

If the conduct of the then owners may be explained consistently with the continued claim to the land, an abandonment will not be presumed. **Reelfoot Lake Case,** 127 Tenn. 575, 597.

Divesture of a vested legal title by abandonment is unknown at common law, unless it results from some estoppel or adverse possession under a statute of limitations. **So. Coal & Iron Co. v. Schwoon,** 45 Tenn. 191, 225; **Tennessee Oil Co. v. Brown,** 131 Fed. 696, 65 CCA 524.

The guardrail between the approach to the bridge and the landscaped strip is no evidence of abandonment. A barrier in a stream does not prevent it being a navigable river. **United States v. The Montello,** 87 U. S. 443 (20 Wall.).

Landscaping of the small strip in question is not an abandonment of its use for highway purposes. It is in keeping with good highway planning, promotes safety and is consistent with National policy. The Congress has declared it to be in the public interest to assist the States to control the use of and improve areas adjacent to the interstate system of highways by regulating outdoor advertising signs. 72 Stat. 904, 23 U. S. C. A. 131. The Congress permits federal funds appropriated for such highways to be used for roadside and landscape development, 72 Stat. 916, 23 U. S. C. A. 319.

The Congress has declared the purposes of the Interstate System of Highways to be to connect by the most direct routes practicable the principal metropolitan areas, to secure the national defense and to connect with important international routes. 72 Stat. 888, 23 U. S. C. A., Sec. 103 (d).

In keeping with this policy it is and will continue to be necessary to acquire whole lots and the buildings thereon to construct straight and direct highways even though some small strips of the lots may not be immediately needed for construction purposes.

In the original taking it would have been a denial of due process to A. L. Kornman Company if all of its lot

except the small strip here in question and the one multiple story wall therein had been taken without compensating it for the whole value of its lot and building.

Finally, it is respectfully submitted that the State Court did not err in dismissing this suit on the ground of sovereign immunity.

It is an established principle of jurisprudence in all civilized nations, resting upon grounds of public policy, that a sovereign cannot be sued in its own courts or any other court without its consent or permission. This principle applies with full force to the several states of the Union. 49 Am. Jur. 301-2, States, Territories, and Dependencies, Section 91. This authority cites decisions from the Courts of thirty-two (32) states, as well as numerous decisions of the Supreme Court of the United States in support of this proposition.

As was pointed out in the case of **Petty v. Tennessee-Missouri Bridge Commission**, 359 U. S. 275, 279, the immunity doctrine is strictly applied in Tennessee.

In the case of **Malone v. Bowdoin**, 369 U. S. 643, the Court, in discussing the case of **United States v. Lee**, 106 U. S. 196, 27 L. Ed. 171, said:

> "The **Lee** case has continuing validity only 'where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation.'"

In the case at bar it is not alleged by the complainant, nor can it be alleged, that the property in question was unlawfully acquired by the City of Nashville and the State of Tennessee. As a matter of fact, the complainant admits that the condemning authorities had a lawful right to acquire the property in question (R. p. . . .). Complainant does not allege that it was not justly compensated for the property in question.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Appellee's motion to dismiss this appeal should be sustained and the appeal dismissed.

.....

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